CACV 3249

IN THE SASKATCHEWAN COURT OF APPEAL

BETWEEN:

CAROLYN STROM

APPELLANT

- and –

SASKATCHEWAN REGISTERED NURSES' ASSOCIATION

RESPONDENT

- and –

CANADIAN CONSTITUTION FOUNDATION

PROPOSED INTERVENER

FACTUM OF THE PROPOSED INTERVENER,
CANADIAN CONSTITUTION FOUNDATION

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I. INTRODUCTION

1. Carolyn Strom publicly expressed her views, in balanced and reasonable language, about the treatment her grandfather received at a care home. Had she been an ordinary citizen, this could have been no reason for the authorities to punish her. That is what freedom of expression means: citizens can express their opinions without being punished for doing so.

2. But Ms. Strom is not just an ordinary citizen: she is a nurse. As such, she is subject to the disciplinary authority of the Saskatchewan Registered Nurses' Association, whose discipline committee (the "Committee") fined her for sharing her opinion on her grandfather's treatment. The Committee took the position that for a nurse to publicly express herself the way Ms. Strom did, even outside of work, amounted to professional misconduct.[1] It then imposed a fine of $1,000.00 and ordered Ms. Strom to pay the cost of the proceedings in the amount of $25,000.00. (*Strom v Saskatchewan Registered Nurses' Association*, 2018 SKQB 110 at para 22 [*Strom*]).

3. The Committee acknowledged that punishing Ms. Strom for expressing her views infringed her constitutionally protected freedom of expression, but it thought that there was sufficient justification for this infringement. Freedom of expression and the limits to which it can be subject in a free and democratic society are thus central to this appeal. Ms. Strom would not be in court but for her communication of her views to the public and the curtailment of her freedom to do so by the Committee.

4. The court below was right that, to dispose of the matter, it had to determine whether the Committee "made the kind of mistake that requires the court to interfere." (*Strom* at para 4). But, in the respectful view of the Canadian Constitution Foundation ("CCF"), he erred in saying that this, rather than freedom of expression, "is the focus of the appeal." (*Strom*

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[1] The Committee's power to punish professional misconduct rests on *The Registered Nurses Act, 1988*, SS 1988-89, c R-12.2, s 26 [*RNA*]

at para 4). Review frameworks are only lenses that courts use to focus on the issues at stake. The real focus of this appeal, what is at stake here, is indeed freedom of expression.

II. JURISDICTION AND STANDARD OF REVIEW

5. On appeal from a decision applying the judicial review framework, the two-fold question is: did the court below "choose the correct standard of review and apply it properly?" (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559 at para 47). The applicable standard of review in this case is not simply reasonableness: it is a special form of reasonableness review appropriate to the context of infringement of a *Charter* right,[2] which has been described by the Supreme Court of Canada ("SCC") in *Doré v Barreau du Québec,* 2012 SCC 12, [2012] 1 SCR 395 [*Doré*], and explained in *Loyola High School v Quebec (Attorney-General),* 2015 SCC 12, [2015] 1 SCR 613 [*Loyola*] and *Law Society of British Columbia v Trinity Western University,* 2018 SCC 32 [*TWU*].

III. SUMMARY OF FACTS

6. The CCF adopts the statement of facts set out in the judgment below.

IV. POINTS IN ISSUE

7. The CCF submits that the court below did not properly apply the correct standard of review in holding that the Committee proportionately balanced Ms. Strom's right to freedom of expression with the objectives of the *RNA*. The court deviated from the SCC's explanation of the review framework for administrative decisions involving infringements of *Charter* rights by showing excessive deference to the Committee's decision and not giving due weight to Ms. Strom's constitutional rights.

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[2] While the CCF believes that the appropriate standard of review for any *Charter* infringement should be "correctness," this factum describes the most recent standard of review articulated by the SCC.

V. ARGUMENT

A. Administrative Decisions that Implicate the *Charter* Call for Robust Review

8. The court below purported to review the Committee's decision to punish Ms. Strom for her public comments by applying the framework set out in *Doré* and explained in *Loyola.* The SCC recently provided further guidance regarding the application of this framework *TWU*, which was rendered after the decision below and thus unavailable to the court.

9. *Doré*, *Loyola*, and *TWU* provide the lens for bringing constitutional rights into focus within the administrative context. Their starting premise is "that administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values." (*Doré* at para 24). In examining administrative decisions through the lens of these cases, courts must not abdicate their responsibility to uphold constitutional rights and values. On the contrary, as the SCC has repeatedly stressed, these cases require courts to ensure "rigorous" and "effective *Charter* protection." (*Doré* at paras 4-5). Courts must do this by undertaking "a *robust* proportionality analysis" (*Loyola* at para 3 (emphasis in the original)) and "not a weak or watered-down version." (*TWU* at para 80).

10. While the lens supplied by *Doré*, *Loyola*, and *TWU* bears the labels of reasonableness and deference, this does not mean that a court scrutinizing an administrative decision may content itself with a blurred image of the rights at stake or of the decision's impact on the person affected by it. As the SCC explained in *Doré* at para 5:

> I see nothing in the administrative law approach which is inherently inconsistent with the strong *Charter* protection – meaning its guarantees and values – we expect from an *Oakes* analysis. The notion of deference in administrative law should no more be a barrier to effective *Charter* protection than the margin of appreciation is when we apply a full s. 1 analysis.

11. As the Court of Appeal for Ontario has explained, "the nature of the justification" required for the state to limit *Charter* rights "remains the same" (*Bracken v Fort*

Erie (Town), 2017 ONCA 668, 137 OR (3d) 161 at para 63 [*Fort Erie*]) in the administrative and non-administrative contexts. And as the SCC recently confirmed in *TWU* at paras 80 and 82:

> When a decision engages the *Charter*, reasonableness and proportionality become synonymous. Simply put, a decision that has a disproportionate impact on *Charter* rights is not reasonable.
>
> …
>
> The reviewing court must also consider how substantial the limitation on the *Charter* protection was compared to the benefits to the furtherance of the statutory objectives…

12. While reasonableness review often arises in situations where an administrative decision involved a choice among "range of possible, acceptable outcomes" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190), this is not always the case. Sometimes, "there is only one reasonable outcome," which a reviewing court must impose. (*Groia v Law Society of Upper Canada*, 2018 SCC 27, 34 Admin LR (6th) 183 at para 125 [*Groia*])

13. Moreover, *Doré*, *Loyola*, and *TWU* emphasise the importance of context in the review of administrative decisions (*Loyola* at para 41; *TWU* at para 57), which is consistent with the SCC's position that "reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors." (*Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2, [2012] 1 SCR 5 at para 18). Administrative decision-makers may have particular awareness of aspects of the context within which they operate, notably, their enabling statutes and facts that fall within their special expertise. However, a reviewing court will have contextual insights of its own, especially in respect of "the fundamental values protected by the *Charter*," which it is charged with upholding. (*Loyola* at para 37).

14. In short, the lens developed by the SCC for the review of administrative decisions that infringe *Charter* rights does not call for judicial abdication: the standard of review described in *Doré*, *Loyola*, and *TWU* is far from a rubber stamp. Although different in form from the *Oakes* framework, the SCC has made it clear that it is intended to protect the same *Charter* rights just as robustly as the *Oakes* test. (*Doré* at para 5). It most certainly does

not require a reviewing court to accept uncritically the decision-maker's constitutional determinations.

B. Review Below Was Not Sufficiently Robust

15. The court below erred by not engaging in a sufficiently "robust" and contextual review of the Committee's decision in light of the clear infringement of Ms. Strom's *Charter* right. The court found that the Committee's decision was not unreasonable:

> …when the discipline committee balanced the objective of governance of the profession with the right to freedom of expression, the committee concluded that the infringement of the right to freedom of expression was justified, in part because of the nature and extent of the harm to the profession and in part because the infringement still left Ms. Strom with another avenue of expressing her concerns. (*Strom* at para 111)

16. Yet as the SCC observed in *TWU*:

> …it is not enough for the decision-maker to simply balance the statutory objectives with the *Charter* protection in making its decision. Rather, the reviewing court must be satisfied that the decision *proportionately* balances these factors, that is, that it "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate." (*TWU* at para 80, quoting *Loyola* at para 39 (emphasis in the original))

17. The court below did not question whether the Committee's decision to punish Ms. Strom "gave effect as fully as possible" to her freedom of expression in light of the Committee's mandate to uphold the best interests of the public and nurses, and the standing of the profession of nursing (*RNA*, section 26(1)). Unlike the SCC in *Loyola* and *TWU*, the court also did not consider whether alternatives were available to the Committee that would have been more respectful of Ms. Strom's *Charter* right to freedom of expression. This was a clear error that calls for this court's intervention.

C. Giving Effect to Ms. Strom's Freedom of Expression as Fully as Possible

18. The Committee failed to give effect to Ms. Strom's freedom of expression as fully as possible, as required by binding precedent.

19. Ms. Strom had the right to criticize the care that her grandfather received. As the SCC has observed in *R v Guignard*, 2002 SCC 14, [2002] 1 SCR 472 [*Guignard*] a person's freedom of expression includes the ability "to criticize a product or make negative comments about the services supplied … [w]ithin limits prescribed by the legal principles relating to defamation. … Consumers may express their frustration or disappointment with a product or service." (*Guignard* at para 23). Of course, Ms. Strom wasn't a direct consumer of the care given to her grandfather, but there is no reason why the right would be limited to direct consumers, especially given the practical limitations on her grandfather's ability to publicly express any concerns.

20. Such criticism, the SCC explained, "is a form of the expression of opinion that has an important effect on the social and economic life of a society. It is a right not only of consumers, but of citizens." (*Guignard* at para 24). It is a contribution to society's store of information and opinion, which freedom of expression fosters. It benefits the public, and not merely, perhaps not even primarily, the person engaged in such criticism.

21. Nor can the right to criticize the services one receives be limited to the realm of commerce. It must extend to public services. Indeed, when it comes to our healthcare system, the courts have long taken specific note of Canadians' proclivity for criticism.[3] This can, of course, be borne out of personal experiences, as it was in the case of Ms. Strom. But criticism is also public-spirited. As the Court of Appeal of Alberta has remarked, "many Canadians criticize the system" despite feeling pride in it, because "they would like it to be even better than it is." (*Allen v Alberta*, 2015 ABCA 277, 606 AR 274 at para 14). Given the centrality of the healthcare system to public preoccupations (*Chaoulli* at para 2), public censure of its perceived shortcomings is manifestly in the public interest.

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[3] See *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791 at para 2 ("As we enter the 21st century, health care is a constant concern. The public health care system, once a source of national pride, has become the subject of frequent and sometimes bitter criticism.") [*Chaoulli*].

22. For this reason, it is not enough to say "that Ms. Strom was not left without an avenue for expressing her concerns" (*Strom* at para 110) because she could and should have expressed them in a different forum, addressing herself to actors within the system. It was important that she be able to draw her critical views to the attention of the public, as she did so in terms and tone that, it must be borne in mind, were balanced and non-inflammatory. The Committee and the learned judge below saw the public response to Ms. Strom's comments as showing that "those comments… harmed the standing of the nursing profession." (*Strom* at para 76). Yet the record shows no evidence of a real harm to the standing of nursing profession; this was just the interpretation of a defensive professional regulator. If anything, what the public response shows is that the public was concerned about the issues raised by Ms. Strom, and that their airing was in the public interest.

23. Criticism of the way in which public services are delivered — even by those entrusted with delivering these services — does not necessarily undermine public confidence in these services. Thus, in *British Columbia Public School Employers' Association v British Columbia Teachers' Federation*, 2005 BCCA 393, 257 DLR (4th) 385 [*B.C. Public School*], the Court of Appeal for British Columbia upheld the right of teachers to speak critically "about class size and composition" to the parents of their students. (*B.C. Public School* at para 50). The court found that such criticism could even "enhance confidence in the school system," (*B.C. Public School* at para 50) presumably because the public will trust a system staffed by engaged individuals who care about its success more than it would one run by those indifferent and disengaged.

24. In any case, the right to choose one's audience is an inextricable part of the freedom of expression. Thus, in *Guignard*, the SCC explained that consumers' "freedom of expression…is not limited to private communications intended solely for the vendor or supplier of the service. Consumers may share their concerns, worries or even anger with other consumers and try to warn them against the practices of a business." (*Guignard* at para 23). The SCC went on to hold that preventing a person from using the means of communication

that would allow him reach his preferred audience — in that case, a billboard, but, as the court noted, the principle could apply to "posting messages on the Internet" (*Guignard* at para 25) — was an infringement of his freedom of expression.

25. The same principle has repeatedly been applied in cases dealing with restrictions on expression or protest on public property. The ability to access a particular audience, whether one as wide as all those who come across city buses (*Greater Vancouver Transportation Authority v Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 SCR 295), or a narrower one, such as those present in a public park (*Bracken v Niagara Parks Police*, 2018 ONCA 261, 421 DLR (4th) 157 at para 49) or attending a town council meeting (*Fort Erie* at para 59), has been found to support claims that freedom of expression in a particular place was protected. (By contrast, in a case where "[i]t was not suggested … that [the appellant] express himself to a different group of people, rather simply that he change the location of his activity to [one] *where he would have access to the same potential audience*," (*R v Breeden*, 2009 BCCA 463, 277 BCAC 164 at para 27 (emphasis added)) the appellant's exclusion from a specific place did not infringe his freedom of expression.)

26. In short, the *Charter* protects Ms. Strom's right to criticize the care her grandfather had received. Her criticism was a contribution to the public discourse, even though, and indeed, because of her position as a nurse. And, as a matter of freedom of expression, Ms. Strom had the right to direct this criticism at the audience of her choice; she did not have to address it privately to government authorities. Under the *Doré/Loyola* framework, the Committee's decision could only infringe this right if justified.

27. The Committee was required to respect these considerations when deciding whether it could punish Ms. Strom for criticizing the way in which her grandfather was treated within the healthcare system. As noted above, it follows from *Doré* that the Committee was

bound to adjudicate Ms. Strom's case "consistently with the values underlying the grant of discretion, including *Charter* values," which include her right to expression.

28. The Committee failed to do so, and the court below erred in not finding that this failure was unreasonable. The court below treated the issue of whether the Committee's finding that Ms. Strom had committed professional misconduct in isolation from Ms. Strom's freedom of expression. As a result, the court rejected the possibility that the *Charter* requires that professional misconduct, within the meaning of the *Act*, had to be given a narrower scope than that given to it by the Committee.

29. Insofar as the Committee had discretion in its interpretation and application of the notion of professional misconduct, it was bound to exercise this discretion in a manner that took the *Charter* right of expression, including the value of public criticism in the context of healthcare services, into account – and not just perfunctorily into account, but seriously. To repeat, the Committee had to "give[] effect, as fully as possible to the *Charter* protections at stake given [its] statutory mandate" (*Loyola* at para 39) to uphold the interests of the public and of nurses and the standing of the nursing profession.

30. As the SCC clarified in *TWU*:

> The reviewing court must consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives. … [I]f there was an option or avenue *reasonably* open to the decision-maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant statutory objectives, the decision would not fall within a range of reasonable outcomes. (*TWU* at para 81 (emphasis in the original))

31. Such was the case when the Committee was considering whether to punish Ms. Strom for her comments, and indeed the court below expressly so found. The court accepted that the position that "damage to the reputation of a handful of nurses is not damage to nurses as a whole, is not damage to the nursing profession," (*Strom* at para 83) advanced below by the intervener the Saskatchewan Union of Nurses, "was available to the [C]ommittee" (*Strom* at para 84) Similarly, the court accepted that the "[C]ommittee may have chosen to take the

path of looking for 'reprehensible' conduct," (*Strom* at para 88) requiring a measure of blameworthiness before concluding that Ms. Strom engaged in professional misconduct.

32. Although not canvassed by court below, an additional option for the Committee would have been to find that comments made as a good faith contribution to public discussion of healthcare services cannot constitute misconduct. This is especially so in light of the Committee's statutory mandate to uphold "the best interests of the public," not just those of nurses. As noted above, courts have previously held that commentary and criticism regarding public services, such as healthcare, including by those engaged in the provision of and most knowledgeable about such services, is in the interests of the public — even if those responsible for the provision of public services would rather not be subject to such public accountability.

33. The court below recognized that the "[C]ommittee could have taken a different approach to its determination," and indeed acknowledged the possibility "that some of these suggestions would have been better approaches for the [C]ommittee to have taken." (*Strom* at para 91). This was correct. But then the court balked; it refused to interfere with the Committee's decision on the basis that its approach was nevertheless not unreasonable.

34. Respectfully, this was error. Following the SCC's announcement of the standard of review in *Doré*, and its further clarification in *TWU*, an administrative decision cannot be regarded as reasonable if alternatives that would have advanced the decision-maker's mandate while giving fuller effect to the *Charter* rights of the person affected by it were available. Having found that options were reasonably available to the Committee that would have better protected Ms. Strom's right to free expression, the court below was required to conclude that the Committee's decision was not reasonable.

35. In addition, the court below erred in failing to "consider how substantial the limitation on the *Charter* protection was compared to the benefits to the furtherance of the statutory objectives." (*TWU* at para 82). The Committee's decision to punish Ms. Strom

substantially limited her freedom of expression. Ms. Strom has been denied the right that would have been available to other Canadians to speak out about the quality of services received by a loved one. The public, meanwhile, has been denied the benefit of her opinions on this subject.

36. Yet what has the Committee obtained for this heavy price? Very little. This was not a case of a profession taking a stand against an "excessive degree of vituperation," (*Doré* at para 71) as was the case in *Doré*. Nor was it a case of upholding the equal rights of any persons or any other recognized *Charter* value, as was the case in *TWU*. Instead, it showed that the nursing profession in Saskatchewan, acting through its regulatory authority, is willing to suppress public criticism of nursing services, even balanced and non-inflammatory criticism of the kind offered by Ms. Strom. This is a failure to uphold "the standing of the profession of nursing" or "the best interests of the public." (*RNA*, section 26(1)).

37. In *TWU*, the SCC explained that an administrative "decision that has a disproportionate impact on *Charter* rights is not reasonable." (*TWU* at para 80). This is what has happened in this case. The Committee could have complied with its statutory mandate while affording greater protection to Ms. Strom's rights. The seriousness of the infringement of Ms. Strom's *Charter* rights far outweighs any benefit in the Committee's decision. This was disproportionate, and therefore *per se* unreasonable. Applying the standard of review described in *Doré* and *TWU*, this court should conclude that the Committee's disciplining of Ms. Strom for exercising her right of public criticism must be set aside.

VI. RELIEF SOUGHT

38. The CCF respectfully submits that the appeal ought to be allowed and the decisions of the Committee finding that Ms. Strom engaged in professional misconduct and imposing a penalty, set aside.

39. The CCF does not seek costs and asks that, as a registered charity engaged in public interest litigation, no costs be imposed against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Regina, in the Province of Saskatchewan, this 15th day of February, 2019.

CANADIAN CONSTITUTION FOUNDATION

Per: _____

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VII. AUTHORITIES

Statute

Registered Nurses Act, 1988, SS 1988-89, c R-12.2

Cases

Agraira v Canada (Public Safety and Emergency Preparedness), 2013 SCC 36, [2013] 2 SCR 559

Allen v Alberta, 2015 ABCA 277, 606 AR 274

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